

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 422 of 1987

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

GHELA PUNJA HARIJAN

Versus

AMARIBAI BUDHA HARIJAN

Appearance:

MR SHAILESH C PARIKH for Petitioner
MRS SANGEETA N PAHWA for Respondent No. 1
PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 24/01/97

ORAL JUDGEMENT

Petitioner herein is an erring husband who has failed to pay maintenance to respondent No. 1 - wife as directed by the learned Judicial Magistrate, First Class, Jamnagar on 6th September, 1980 under order made on Criminal Miscellaneous Application No. 14 of 1979.

2. In view of the default committed in payment of maintenance of Rs.100/- directed to be paid as stated hereinabove, respondent No.1 preferred Criminal Miscellaneous Application No. 161 of 1983 under section 125(3) of the Code of Criminal Procedure [hereinafter referred to as "the Code"]. Said application was allowed by the learned Judicial Magistrate, First Class, Jamnagar directing the petitioner to pay to respondent No. 1 sum of Rs.4000/towards the arrears of maintenance failing which, he was sentenced to undergo simple imprisonment for fifteen months. Said order was challenged by the petitioner before the learned Sessions Judge, Jamnagar in Criminal Revision Application No. 188 of 1989. Said Criminal Revision Application was dismissed on 24th May, 1985. In view of the above referred order dated 24th May, 1985, learned Magistrate, under his order dated 3rd April, 1986, directed to issue a warrant for recovery of Rs. 4,000/- being the arrears of maintenance. The petitioner, however, failed to deposit the said amount and, therefore, on 9th February, 1987, the Court made an order against the petitioner to undergo simple imprisonment for one year and 15 days in compliance with its earlier order dated 25th November, 1983.

3. The above order dated 9th February, 1987 was challenged by the petitioner before the learned Sessions Judge, Jamnagar in Criminal Revision Application No. 6 of 1987 which was dismissed on 4th April, 1987. Feeling aggrieved, the petitioner has preferred this petition.

4. Learned advocate Mr.Parikh has appeared for the petitioner and has contended that no notice was issued to the petitioner before issuing the warrant under the impugned order dated 9th February, 1987. He has further contended that the warrant issued is neither in consonance with Form No. 18 nor Form No. 19. Thus, in view of the defect in the procedure adopted by the learned Magistrate, the impugned order dated 9th February, 1987 requires to be quashed and set aside. In support of his contention, he has relied upon the judgment of Kerala High Court in the matter of K. Nityanand v. B. Radhamani and Anr. [1980 Cri. LJ pg.1191]. The Court has held that the course adopted by the Magistrate in sentencing the husband on failure of payment of the amount of maintenance with imprisonment was improper. The Court held that under sec.421 of the Code, two modes were provided for recovery of the arrears of maintenance due as if it were a fine levied. The Court held that the powers conferred on the Magistrate in this regard have to be exercised in the manner and in sequence indicated in sub-sec.(3) of section 125 of the

Code. He has relied upon the judgment of the Punjab and Haryana High Court in the matter of Om Prakash [1992 Cri. LJ pg.658]. In this judgment too, the Court held that the Court cannot pass the order of arrest without resorting to coercive measures provided under section 421 of the Code like attachment of property, etc.

5. I am of the view that none of these contentions raised by Mr. Parikh is tenable. The order to pay up the arrears of maintenance was made on 25th November, 1983 and on failure of the petitioner in doing so, he was sentenced to undergo simple imprisonment for fifteen months. Said order was challenged by the petitioner by filing criminal revision application no. 188 of 1983 which was rejected on 24th May, 1985. The order of the revisional court was not challenged further and, thus, has become final. What is sought to be done under the impugned order is merely an implementation of the earlier order dated 25th November, 1983 which has been confirmed in criminal revision application No. 188 of 1983. Further, the petitioner was also given one more chance to pay up the arrears of maintenance under order dated 3rd April, 1986 which too he failed to avail of. Since the impugned order is merely an order of implementation of the earlier order made on 25th November, 1983, it cannot be interfered with. The petitioner by raising fresh contentions cannot be permitted to challenge the order dated 25th November, 1983 in the present case.

Mr. Parikh has contended that the order dated 25th November, 1983 was made in contravention of law and such illegal order cannot be perpetuated by implementing the same. I cannot accept this contention either. The order of 25th November, 1983 has become final. This Court, at this stage, cannot examine the legality of that order.

6. In view of the above discussion, this petition is dismissed. Rule is discharged.

7. Mr. Parikh, learned advocate for the petitioner has requested that the operation of this order be stayed for a period of eight weeks from today. Request is rejected.

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